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The Forensic Theory of Law

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THE FORENSIC THEORY OF LAW.

I.

In every county of every state in the American Union there is a group of hard-working, educated men who support themselves and their families with money which they acquire by selling scientific knowledge concerning one particular phenomenon. These men are lawyers. The phenomenon concerning which they sell scientific knowledge is law.

What is law? It is impossible to answer that question without entering the domain of controversy. It is impossible to say anything in the least degree positive or definite regarding the nature of law without contradicting something equally positive and definite already uttered by other persons. When we remember that the phenomenon called law is something that has been characteristic of all politically organized groups of human beings in all parts of the world and at all periods of history, and when we remember further how enormously these politically organized groups of human beings have differed from one another, it is not surprising to find a certain amount of conflict in the various notions of law that are accepted as classic. It is safe to say that up to the present time no concept of law has yet been made concrete in the consciousness of any human being that is broad enough and at the same time distinct enough to harmonize with all the forms of law that have existed among men.

Very frankly let it be admitted that there are certain restrictive limitations making it impossible for any human being to think cosmically and with ideal clearness on the subject of law. For immediate purposes it will be assumed that any person who undertakes to discuss the nature of law must make allowance for three separate factors, each of which is in the nature of a restrictive limitation upon his powers of thought. These are, first, the restrictive limitation of time; second, the restrictive limitation of nationality; third, the restrictive limitation of vocation.

We human beings are in the habit of dividing time into the past, the present, and the future. When we talk about the present we do not mean a single instant in an abstract or mathematical sense. We mean in a general way the recent past and the immanent future. It is in that sense that the word is now used. It is quite proper to study

the phenomenon of law in the past. It is quite proper to study the phenomenon of law in the present. It is quite proper to study the phenomenon of law in the future. But the mental processes and the habits of thought of the student are apt to vary according as the subject of investigation is the law of the past, or the law of the present, or the law of the future. Roughly speaking there are three methods, or schools of jurisprudence which have to do with this three-fold division of law. Historical jurisprudence has to do with the law of the past. Analytical jurisprudence has to do with the law of the present. Philosophical jurisprudence has to do with the law of the future; that is to say, with the ideal possibilities of legal development. The term philosophical jurisprudence has not been very popular with English-speaking lawyers since the days of the French revolution. But in our own generation the thing is reappearing under another name, to-wit, sociological jurisprudence. There is no doubt a great difference between the particular forms of philosophical jurisprudence of earlier centuries and the sociological jurisprudence of the twentieth century, but looked at in a broad way sociological jurisprudence must be regarded as simply a newer form of philosophical jurisprudence. It has to do with possible improvements in positive law.

Frankly recognizing the restrictive limitation of time, I now announce that for immediate purposes the law to which attention is invited is primarily a phenomenon of the present time, and not a phenomenon of ancient history, anthropology, or primitive racial psychology. As now regarded, law is primarily an existing phenomenon and not primarily the subject matter of fanciful speculations concerning the future. To express the same thought in technical language the nature of law will be examined from the analytical viewpoint rather than from the historical viewpoint or the philosophical viewpoint. So much for the restrictive limitation of time.

What is meant by the restrictive limitation of nationality? One of the most persistent and one of the most futile efforts of civilization has been the effort to ignore nationality. The developed Roman Empire went very far in ignoring nationality and the Roman Empire ceased to exist. Christianity in theory transcends nationality, but the theory is nothing but an attenuated tradition. Three years ago Socialists in Europe shouted themselves hoarse for internationalism, and today those same Socialists under national banners are pointing machine guns at other Socialists under other banners who also

shouted for internationalism three years ago. International law, insofar as it has ever attempted to do anything except emphasize the rights of nations, is a beautiful bubble of emptiness. The biggest fact in the world is the fact of nationality. Law is a function of nationality. As nations differ so will laws differ, and so will the theories of law differ. I offer no apology for stating most emphatically that I am approaching law, not from a cosmopolitan standpoint, but from an American standpoint. No investigator of law ever approached it from any standpoint except a national standpoint, although some investigators have sincerely thought otherwise. So much for the restrictive limitation of nationality.

By the restrictive limitation of vocation is meant the narrowing and also strengthening effect of a professional viewpoint. Lawyers know more about law than do other people. If they did not they would starve to death. The nature of the law is to be considered from the viewpoint of those educated in the knowledge, the theories, the experiences, the traditions, and the romances of the legal profession.

To sum up, the nature of law will be considered from the viewpoint of a modern American lawyer.

II.

A definition of law will now be presented. This particular definition was first uttered in 1909 by the Supreme Court of the United States while deciding a controversy between the American Banana Company and the United Fruit Company. This is the Supreme Court's definition: "Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts" (213 U. S. 347, 356). The notion of law corresponding to these words is a notion distinctively modern, American and professional. This definition comes nearer to satisfying the average American lawyer who supports his family by selling systematized knowledge of law than do any of the better known definitions which have been inherited from earlier generations and imported from across the Atlantic.

There are five elements in the notion of law made concrete by these words. There is, first, a formulative element; second, a human element; third, a political element; fourth, a coercive element; and, fifth, a forensic element. The first four of these five elements will be considered briefly. The fifth element, the forensic element, will be considered at greater length.

What is meant by the formulative element in law? Blackstone described law as "a rule of conduct." Bentham designated it as a "portion of discourse." Austin told us about a "command." This definition refers to a "statement of circumstances." Note the formulative suggestion in all of these words: rule, discourse, command, statement. Law is something which is formulated or possesses the possibility of being formulated. It is proper for us to talk about the rules of baseball for 1926 although they have not yet been actually formulated. We know perfectly well they will be formulated some day or else they can never be rules. At the present time it is worth while to emphasize this formulative element in law. The influence of such men as William James, Maeterlinck, Bergson and Eucken has been a broadening influence, but if allowed to operate indiscriminately will appear also to be a confusing influence. Some people are disposed to criticise our judges because they are not impressionistic enough, because they are not sufficiently spiritual, because they do not decide cases according to inherent justice—whatever that may be—or because they do not act in accordance with the promptings of their own consciences. This is an attack upon the formulative element of law. If our courts could decide cases without being able to give reasons and without formulating a rule of decision, they might be administering something better than law, but they certainly would not be administering law. We lawyers are perfectly willing to debate with anarchists the question: Should law be abolished? We are unwilling to debate with sentimentalists the question: Should law exist without a formulative element? That would be like considering the desirability of drawing square circles or manufacturing white lampblack.

In this generation it is unnecessary to emphasize the human element in law when the term is being used in its professional sense. The hypothesis of a divine law operating upon angels is accepted by many lawyers, but the acceptance or rejection of that hypothesis does not have the slightest effect upon the ability or usefulness of any lawyer in the land. Rudyard Kipling can tell us many interesting things regarding the law of the jungle, but the law of the jungle is not real law for the simple reason that it does not possess the human element. The Supreme Court's definition of law is limited to circumstances which operate upon men and what is owned by men.

What is meant by the political element in law? No one knows exactly. During the past few centuries the political element of law has nearly always been identified with the power of the state. All

will agree that there must be a political element in the notion of law. It is also true, however, that many earnest men on the advance guard of thought are contemplating the possibility of law sanctioned by a political power radically different from the state, as that term is commonly understood. "The public right" was a favorite and significant expression of Mr. Gladstone's. The public right is a political right and a national right, but not necessarily the same thing as the right of the state or the right of the Government. Mr. Woodrow Wilson used to teach his students at Princeton to glory in the fact that the Constitution of the United States is a revolutionary document. Its adoption was due to a deliberate and splendid violation of the right of the state as expressed in the Articles of Confederation. The Supreme Court's definition makes use of the word "public," but does not make use of the word "state." The Supreme Court's definition is so broad that it would not pass muster in orthodox circles in the German universities. The sanction of law must be a public sanction, which means a national sanction, but not necessarily a state sanction.

Austin in England and Stammler in Germany deserve credit for making clear that a coercive element is essential to the existence of law. Without the coercive element and the machinery for applying force, it would be difficult to distinguish between law and conventionality—for instance, the conventionality that a man must not wear a red necktie when in full evening dress. At the same time the practical importance of the coercive element must not be overestimated. Physical force in American jurisprudence is like real money in the American business world. A very little, with confidence in our fellow men—that is credit—goes a long way.

The distinctive feature of this twentieth-century American definition of law is the express inclusion of the forensic element. That law exists only by virtue of a sanction from the state or ultimate political authority has long been a truism. This twentieth-century definition of the Supreme Court deliberately, scientifically, and without apologetic empiricism, includes as an essential ingredient the idea that courts are the law-functioning organs of the nation. The idea itself has been floating around for a long time. In 1803 Chief Justice Marshall, in the famous case of *Marbury vs. Madison*, said: "It is emphatically the province and duty of the judicial department to say what the law is."

In 1820, Daniel Webster, while speaking before a Constitutional Convention in Massachusetts, said: "The Constitution being the

supreme law, it follows, of course, that every act of the legislature contrary to the law must be void. But who shall decide the question? Shall the legislature itself decide? If so, then the Constitution ceases to be a legal and becomes only a moral restraint on the legislature. If they, and they only, are to decide whether their acts be conformable to the Constitution, then the Constitution is admonitory or advisory only, not legally binding; because, if the construction of it rest wholly with them, their discretion in particular cases, may be in favor of very erroneous and dangerous constructions. Hence the courts of law, necessarily when the case arises, must decide upon the validity of particular acts."

The idea of the forensic nature of law must have been in the mind of Abraham Lincoln when, making a public speech in 1858, he said: "What are the uses of decisions of courts? They have two uses. As rules of property they have two uses. First—they decide upon the question before the court. They decide in this case that Dred Scott was a slave. Nobody resists that. Not only that, but they say to everybody else that persons standing just as Dred Scott stands are as he is. That is, they say that when a question comes up upon another person, it will be so decided again, unless the court decides in another way, unless the court overrules its decision. Well, we mean to do what we can to have the court decide the other way."

During the twentieth century the forensic notion has become much more distinct. In 1908, the late Professor John Chipman Gray of the Boston Bar and the Harvard Law School said to the students of the Columbia Law School: "The law of the state or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties." In 1913, my friend, Mr. Frederick N. Judson, of the St. Louis Bar, while lecturing before the students of the Law School of Yale University, said: "The English and American conception of law is a body of rules enforced by the courts."

No court, no law. That is the American formula. As the phenomenon of law is understood by American lawyers, it cannot possibly exist without the coincidence of another phenomenon, namely, a judicial forum.

III.

The most important reason for the existence of the American theory as to the nature of law is connected with the distinctively

American doctrine of the judicial review of legislation. We Americans have gone further than any other people, ancient or modern, in extending the domain of judicial inquiry. As with other nations, so with us, customary law is now in the domain of judicial inquiry. As with other nations, so with us, statutory law is within the domain of judicial inquiry. Going still further our nation has placed constitutional law also within the domain of judicial inquiry. In the courts of both Europe and America, when the customary law is found to conflict with statutory law, the courts declare the former to be abrogated. In the courts of America, but not in the courts of Europe, when statutory law is deemed to be in conflict with constitutional law the former is declared to be abrogated.

In 1885 Sir Henry Maine referred to this function of our courts as "a virtually unique creation of the founders of the Constitution," and added: "The success of this experiment has blinded men to its novelty. There is no precedent for it in the ancient or in the modern world." In art, in music, and even in literature we Americans are colonial, imitative, echoing. In art, music and literature our greatest works, as judged by our most competent critics, are the works which produce not the joy of surprise, but the joy of recognition—the pleasure of recalling something still greater done by masters on the other side of the Atlantic. In Constitutional jurisprudence we are not colonial, but truly national, original, creative. And we are so regarded in other parts of the world.

The doctrine of judicial review is inseparably connected with the case of *Marbury vs. Madison*. In Willoughby's greatest of all textbooks on American constitutional law, published in 1910, the first case cited is *Marbury vs. Madison*. In foreign countries *Marbury vs. Madison* is looked upon as an expression of American culture in very much the same way as the *Divine Comedy* is looked upon by us as an expression of Italian culture. One hundred and thirteen years ago this famous law suit finally established as law the proposition that the Federal courts have the power to declare void those acts of Congress which in the opinion of the courts are contrary to the Constitution. A similar proposition is also established with reference to the state courts. This is the doctrine of judicial review. The doctrine is law because it is acted upon by the courts. As to the source of this law there are three chief views. According to the first or orthodox view—the view of Marshall, Kent, Webster and Cooley—the doctrine follows as a "demonstration" from a mere textual criti-

cism of the Constitution. According to the second view—advanced by Jefferson and Jackson, and still held by some eminent men, including Chief Justice Walter Clark of North Carolina—a textual criticism of the Constitution shows that the doctrine should not exist, and is, therefore, based upon “usurpation.” The third view is the one generally held by the younger members of the American Bar. According to this view a mere textual criticism of the Constitution leaves in doubt the question whether or not the framers of the Constitution intended to establish judicial review of legislation. Consequently higher criticism (*i. e.*, historical criticism) is resorted to. Attention is paid to the views of historians and political scientists. The ideas, theories, hopes, fears, speeches, writings of the men who wanted the Constitution, who drafted it, who adopted it, who fought it, who obeyed it, who disobeyed it, who loved it, who hated it—all these have been studied carefully and the conclusion has come as a matter of fact that the American people, both Federalists and Anti-federalists, in the days when snuff-boxes and shoe-buckles were popular, looked upon the Constitution as a document which authorized judicial review. The net result is a confirmation by history of the theory of the orthodox school.

But it really does not make a particle of difference what historical view one takes. The history of law is something very interesting, but it is not the same thing as law. The doctrine of judicial review is law because it is acted upon by the courts.

In addition to this chief reason, connected with the American doctrine of judicial review, there are several other reasons why Americans have come to manifest this distinctively national trait in their attitude toward law. The first of these other reasons has to do with the romantic and almost mystical doctrine of the “three powers”—the legislative, the executive, and the judicial. It is a mistake to assume, as certain modern critics have done, that when Montesquieu advanced this doctrine in his “*Spirit of the Laws*,” published in 1748, he was advancing something idly evolved from his own speculation. On the contrary, Montesquieu, largely influenced by John Locke, was trying to explain the existing institutions of government in his day, particularly in England, where he lived for eighteen months in his middle age. By what seems like a sort of divination, Montesquieu hit upon distinctions in political science which although theoretical in his day, have since come to be vindicated and actually expressed in the practical experience of mankind.

It is easy to criticize Montesquieu's doctrine. It is easy to accuse him of dogmatism. It is easy to point out danger in a too narrow application of his analysis. The fact remains that Montesquieu's formula, accepted with almost religious devotion by the American colonists, has had a direct influence in producing an American notion of law, which exalts the judiciary to a higher degree than is true of any other notion of law that the world has yet seen. Said the late Mr. Justice Harlan of the United States Supreme Court in 1906: "The great doctrine of the separate independent exercise of judicial authority, as distinguished from legislative and executive authority, is essentially American in origin, for while the thought was suggested by a European publicist shortly prior to the Revolution, it was not distinctly formulated or embodied in a governmental document until that was done in this country in 1776."

Still another reason for the growth of the forensic theory of law in America is due to the enthusiastic reception by Americans of the English notion that the executive or administrative officials of the government are subject to the ordinary law of the land. The effective distinction between administrative law and civil law, so common on the continent of Europe, is unknown to Anglo-American jurisprudence. Before the American Revolution, especially in connection with the Wilkes trials involving the freedom of the press, Magna Charta was interpreted by the courts of England as a document confirming rights to be asserted by the humblest citizens as against the most powerful officers of government—not in special tribunals under control of those officials, but in the ordinary courts of the realm. If a newsboy is arrested illegally by a policeman in St. Louis, the newsboy can make a complaint to the Police Board if he chooses, but he can also bring a suit for damages in the Circuit Court. Every action of every administrative official in England and the United States affecting liberty or property is subject to the acid test of legality in the ordinary courts where a grocer's claim for the price of sugar and cheese would be tested. It is the same system of law and the same kind of a tribunal that tests the legality of the grocer's account and the action of the Secretary of State.

One more reason for exalting the judiciary of the United States may be mentioned. It is connected with the extraordinary duty cast upon the state judges of this country during the first seventy-five years of our national independence. To this duty those judges responded in a way that has not yet been sufficiently praised. This extraordinary

duty was not performed by a mere half-dozen great men like Kent, Shaw and Gibson. It was performed and most adequately performed by a multitude of sincere and patriotic lawyers who went upon the bench infused with that greatest of all blessings, practical common sense. These men, at the very time when it was fashionable in England to speak with scorn of the common law, took the common law and equity of the mother country, that is to say, the traditional as distinguished from the statutory law of England, and worked the same over into a living, practical and serviceable body of rules of decision whereby human controversy in America could be settled and human strife avoided. The social and economic conditions in America at the beginning of the nineteenth century were very different from the social and economic conditions in England at the same time. A too rigid application of the English common law, a colonial attitude of mind on the part of the judges, an ignoring of the maxim to the effect that law varies as the reason for law varies—such circumstances might have changed the entire current of American history and certainly would have prevented American law today from being what it really is. It has always been the popular fashion to give a vast amount of credit to those persons who were responsible for the actual drafting of our written constitutions and our statutes. It has not been the popular fashion to give credit to, or even think very much about, the hundreds of patient, studious and sensible state judges who accomplished one of the most remarkable tasks that has ever been accomplished by any jurists in the history of the world, and that was to take the traditional law of one nation and make it over into the traditional law of another nation. It is because American lawyers have appreciated this extraordinary obligation to the American state judges prior to 1850, that American lawyers are finding it impossible for themselves to think about American law without at the same time thinking about the American tribunals in which that law has always been demonstrated.

IV.

Let us now take up the consideration of some practical applications of the forensic theory of law.

If law is simply a combination of circumstances under which public force is applied through the courts, what is a statute? Of course, all statutes conveniently may be referred to as if they were laws, just as all diminutive human bodies may be referred to as if they were babies. But some diminutive human bodies are not really

babies at all. They are corpses. In exactly the same way, some statutes are not really laws. They are scraps of paper. It is a very solemn duty that courts perform when they declare a statute unconstitutional. The courts do it only with much reluctance. Nevertheless, under the American theory of constitutionalism as now most firmly established, it is the duty of our American courts to compare statutes with the Constitution when called upon to do so in a law suit, and boldly to declare any statute null and void if it conflicts with the Constitution. Accepting the Supreme Court's definition of law, it would follow that a statute is simply one of several circumstances to be considered in determining the existence or non-existence of law.

Can there be such a thing as law in the absence of an express adjudication by the courts? It is impossible for an American lawyer today to imagine an American community living with an entire absence of judicial precedents. Even in new states and territories, the legislative authorities find it necessary to adopt the early common law of England which for practical purposes is nothing more or less than an aggregation of judicial precedents. It is just as easy to think of a black bass swimming without water as it is to think of American civilization existing without judicial precedents. When we come to any particular point of doubt concerning which there has not yet been an express adjudication, can it be said that there is any law on that point? Some lawyers, following the late Professor John Chipman Gray, boldly answer "No." Most lawyers will answer "Yes." The law has not been formulated, but it possesses the possibility of being formulated. It is fated to be formulated. By far the most difficult professional work that a lawyer does is to give his opinion on doubtful questions of law. The test of a lawyer's sagacity is a comparison between his anticipatory opinion and the subsequent decision in the court of last resort. From a social standpoint perhaps the most important work that a lawyer does, and also the easiest, is to give advice on questions concerning which there is no doubt among lawyers as to how the courts would decide if called upon to do so. But from a professional standpoint more significant work is the giving of opinions on doubtful questions.

Attention must now be called to a notable distinction between Anglo-American jurisprudence, on the one hand, and continental jurisprudence on the other hand. On the continent of Europe, there are two kinds of tribunals—one kind of tribunal for applying law as

between private citizen and private citizen, and another kind of tribunal for applying law as between private citizen and public official. The administrative tribunals in which the causes of executive officials are ultimately judged, are in control of the executive officials themselves, and not subject to review by the ordinary courts. The most eminent French and German jurists praise their system, and prefer it to ours. It is not for us to say that our system would be better for them than theirs. It is not necessary for us, even, to say with too much dogmatism that our system is better for us than theirs. But this we must say: Unless we are prepared to give up that entity which in the Constitution is called the "law of the land," we must hold fast to our system. The law of the land means a law that is certain and uniform, and is made certain and uniform as a result of one kind of ultimate tribunals, and not two kinds of ultimate tribunals. We have enough complexity now, thanks to the concurrent jurisdiction of state and federal courts, without introducing the still more confusing factor of administrative law superimposed upon civil law—as they call it in Europe, or the law of the land, as we call it in this country.

This is the place where every American lawyer wants to wave the red flag of danger. There is a marked tendency in contemporary statesmanship to take steps—proper enough in themselves—which may lead to constitutional changes more serious than the establishment of a monarchy or a national church. It is proper to have martial law and military tribunals. It is proper to have a patent office, a land office, a postmaster with power to issue fraud orders, an interstate commerce commission, an immigration bureau, a pure food commission. It is proper and necessary to have a law-interpreting officer in every executive department of the federal government, and for him, in doubtful cases under new statutes, to hear both sides, before rendering a decision, which is in the nature of a legal instruction to executive officers. It is proper to have public-utility commissions in our various states, and boards of health, and insurance commissions, and examining boards for tonsorial artists, perhaps. We lawyers are in hearty sympathy with most, if not all, of these sincere efforts to recognize the changing conditions of our civilization. But we are sensitive to a great danger. We do not want to substitute the multitudinous and confusion laws of a hundred bureaus for the law of the land. These bureaus are executive, primarily. Incidentally and occasionally, they have judicial functions to perform, just as a lawyer has a judicial function to perform when he undertakes to settle a dispute

between a grocer and his landlord. But whenever these bureaus act judicially, their rulings if questioned must be subject to prompt review in the ordinary courts, unless we are ready to change in momentous degree the nature and genius of American civilization. For the most part, there is no doubt about the purely tentative aspect of executive determinations on doubtful points of law. In the Federal Trade Commission statute, a direct method of judicial review is provided by the statute itself, on points of law. In some other cases, the Supreme Court has read the right of judicial review into statutes, by reason of the mere existence of judicial powers. In a few instances, as with the land office, Congress and even the Supreme Court have exhibited a most regrettable indifference to the subtle and anti-American danger of an executive intrusion upon the judicial domain. Scandals in the patent office, always subject to judicial review, have been infinitesimal, compared with scandals in the land office, so largely independent of judicial review. President Taft, with the true lawyer's insight, but in vain, urged Congress to pass statutes providing for appeal to the courts from the rulings in the land office.

On another occasion, President Taft himself made the most dramatic, if not the most important, of recent executive determinations of judicial questions, when he decided the famous controversy over "What is whiskey?" The episode is a fine illustration of the true nature of executive determinations on points of law. The President, admitted by his bitterest enemies in politics to be one of the best lawyers of his generation, was construing the misbranding section of the pure food statute. There was no authoritative interpretation by the appellate courts. The President gave instructions to his subordinates in the executive department of the government, after hearing men on both sides, who had financial interests at stake, and their attorneys. The President's mind acted exactly as if he were a judge. But he was not a judge. Nobody was bound by his decision, except tentatively. To this day, the Taft ruling can be ignored by any citizen who wishes to test the matter in the courts. The fact that nobody has seen fit to bring the matter into court is a tribute to the legal ability of William H. Taft. But it does not mean that the President of the United States is a judge, or ever will be.

One more test of the forensic theory must be made.

If law is simply that which the courts say is law, does it not follow, ultimately, that law is the whimsicality of a judge or a group of judges? This question suggests the chief and most important criti-

cism of the forensic theory of law. In one form or another, this criticism has been urged by many men, and by no man more sincerely or more vigorously than by Thomas Jefferson. The criticism does not seem to have prevented the development of our American doctrine of judicial supremacy, but probably it has retarded conscious acquiescence in the doctrine, and frank admission of its existence. It cannot be stated too emphatically that law is a matter of human experience. The value of this criticism, or any other criticism, regarding law, should be tested in the light of human experience.

Do judges act whimsically? Are they capricious? Is that their reputation as a class in this country, or in any country, at this period, or any period? American judges today are being criticised freely by men who are eminent, sincere and highly educated. Are American judges criticised because they are too whimsical? No. They are not whimsical enough—that is the criticism. At the meeting of the American Bar Association, in October, 1914, the President of the United States, with dignified courtesy to be sure, criticised American judges of the present day. But he did not criticise them for being too independent. On the contrary, his criticism was that judges are slavish, all too slavish, in their devotion to the precedents of the past. When one analyzes any of the current criticisms of the American judiciary, one will find that the real ground of criticism is not that the judges are too subjective, but that they are not subjective enough. Most emphatically judges do respect the external objective standards, whether they be the precedents of the past, or the written Constitution, or the dogmas of a political party, or some economic theory. The question raised by the critics is this: Do not the judges respect these external standards too highly? The most important things in the world are habits of thought. Here is where psychology is needed in connection with jurisprudence.

In the American sense, law, whether it has to do with the wages of a nursemaid or the constitutionality of a statute, is simply the opinion which is, or is fated to be a rule of decision in the court of last resort. Of course, it is assumed that the court of last resort will be a bench of American judges, and not a group of oriental potentates. The difference between a constitutional judge in America and an oriental potentate is a difference in habits of thought. Habits of thought are the most important things in the world. The federal constitution, federal statutes, federal treaties, the state constitution, state statutes, the common law of England, American precedents of

the past, customs and the current needs of society—all these things are sources of law. They are among the circumstances which determine the existence and meaning of law. But we would have nothing except chaos if it were not for the courts, with their distinctive habits of thought to co-relate these multitudinous circumstances. The lawyer's aim is to acquire the same habits of thought that the judges of his generation acquire, and thus to avoid the necessity of law-suits, or else to win law-suits when forced upon him.

In this unexplored region—the borderland between jurisprudence and psychology—the most interesting problem has to do with the overruling of precedents. The prevailing attitude of American courts, which is more liberal than the attitude of the English courts, was never more carefully stated than by the Supreme Court of Massachusetts in 1900 (*Stack v. Railroad Co.*, 177 Mass. 155). A railroad company was sued by a person for damages suffered through an accident on the road. The defendant asked the court to order a physical examination by a surgeon. No statute covered the situation. The court said:

"We agree that in view of the great increase of actions for personal injuries it may be desirable that the courts should have the power in dispute. We appreciate the ease with which, if we were careless or ignorant of precedent, we might deem it enlightened to assume that power. We do not forget the continuous process of developing the law that goes on through the courts in the form of deduction or deny that in a clear case it might be possible even to break away from a line of decisions in favor of some rule generally admitted to be based upon a deeper insight into the present wants of society. But the improvements made by the courts are made, almost invariably, by very slow degrees and by very short steps. Their general duty is not to change, but to work out, the principles already sanctioned by the practice of the past. No one supposes that a judge is at liberty to decide with sole reference even to his strongest convictions of policy and right. His duty in general is to develop the principles which he finds with such consistency as he may be able to attain. . . . In the present case we perceive no such pressing need of our anticipating the legislature as to justify our departure from what we cannot doubt is the settled tradition of the common law to a point beyond that which we believe to have been reached by equity, and beyond any to which our statutes dealing with kindred subjects have ever seen fit to go. It will be seen that we put our decisions, not upon the impolicy

of admitting such a power, but on the ground that it would be too great a step of judicial legislation to be justified by the necessities of the case."

V.

This essay is intended, primarily, to be an analytical consideration of the nature of law as an existing phenomenon, without regard to any philosophical or sociological speculation concerning the purpose of law or the possibility of improving law through the conscious effort of humanity. However, it would be an affectation for any lawyer to assume indifference to the possibility of improving law through the conscious effort of humanity. In order to avoid any appearance of that affectation, even at the risk of inconsistency, I will add one comment of a speculative and sociological nature—perhaps I should say a political nature.

This comment has to do with the American doctrine of judicial review of legislation. The United States has developed, as the most distinctive feature of its civilization, the judicial function of passing upon the constitutionality of statutes. It is a notable power that our courts possess, and, in the opinion of most American lawyers, it is a beneficial power. Distrust of the legislature is characteristic of Americans, as is natural, since our American Revolution was really a rebellion against parliament, rather than against the king, or the courts of England. I know many lawyers, but I have never met one who wished to take this power away from the American courts. At the same time, I have never talked on this subject with any American lawyer who did not frankly admit, in private conversation, that this power has been grossly abused by some of our judges. Judges are human beings. We human beings are slaves to habits of thought, which means that we are slaves to something which is commonly called prejudice. It is easy for a judge to persuade himself that his habits of thought along partisan, religious or economic lines are a part of the constitution which he is oath-bound to support.

There is a radical and lasting difference between an ordinary law-suit affecting the rights of persons and property, and a law-suit in which the constitutionality of statutes—that is to say, the conscious public policy of the state—is involved. My friend, Mr. P. Taylor Bryan, of the St. Louis Bar, has proposed that jurisdiction be conferred upon the Missouri courts to entertain the petition of any citizen who requests that the constitutionality of a particular statute be passed upon—the Attorney-General to be the defendant. This admirable

suggestion is mentioned now, simply for the purpose of showing how clear in the mind of a sagacious practicing lawyer is the distinction between an ordinary law-suit and a law-suit which involves the constitutionality of a statute. In the latter case, the real defendant, when we look beneath the surface, is the state—sometimes acting vicariously for human beings as yet unborn.

Nearly all the current criticism of the courts is caused by the occasional judicial abuse of this most valuable judicial power. In the early days of our country, the courts were very particular to point out the distinction between ordinary law-suits and law-suits involving the constitutionality of statutes. Chief Justice Marshall undertook to establish the precedent that the United States Supreme Court would not pass on the constitutionality of a statute unless all the judges were present, although this full-bench requirement was never dreamed of for ordinary cases. By 1860, there was a considerable body of rules, which seemed to be in the nature of traditional limitations on the power of the courts to declare void the acts of the legislature. These traditional limitations are still printed in the law books. It is said that there must be a full bench, that there must be no doubt in the case, that there must never be an adverse decision by a lower court, etc. What do these traditional limitations amount to now, in 1916? Nothing at all. In St. Louis a justice of the peace on Easton avenue has the power, and has exercised the power, of declaring void the statutes of Missouri. This violates a rule laid down in Willoughby's great work of 1910. But this rule and the others were based upon dicta and tradition. They were never law, in the American sense, because they were never recognized as binding by the courts. Our courts have not formed the habit of recognizing as binding mere dicta and expressions of good taste. They have formed the habit of recognizing as binding the mandatory language of our written constitutions. The so-called rules referred to are noteworthy because they indicate an intent, a hope, a desire, an aspiration of such men as Tyler of Virginia, Tilghman of Pennsylvania, Charlton of Georgia, Waties of South Carolina, Daggett of Connecticut, and Cooley of Michigan.

The effort of these men to establish unwritten legal limitations on the power of judicial review has failed utterly. In the courts of the United States and of all states in the union except two, there is no mandatory distinction between constitutional cases and ordinary cases. Has not the time come to recognize this distinction by means

of constitutional amendments? Has not the time come to establish a mandatory limitation on the power of judiciary review?

That, in my judgment, is the most serious constitutional question now before the American people. The agitation for a change is here. Some change is inevitable. The danger is that the change will be too radical. If by the recall of judicial decisions is meant the power of annulling by popular vote a unanimous decision in the supreme court of a state on a constitutional question, then I am most earnestly opposed to it, because such a power would lead to judicial confusion. But if by the recall of judicial decisions, is meant simply the power of selecting by popular vote between a majority opinion and a minority opinion in the supreme court on a constitutional question, then the plan is worthy of serious and (I am sorry to have to add this additional word) courteous consideration. The so-called Ohio plan, originally proposed by Chief Justice Clark of North Carolina, and now a part of the fundamental law of Ohio, inhibits any judicial annulment of legislation if more than one of the seven members of the supreme court dissent from the majority opinion. This plan also deserves serious consideration.

Both of these plans emphasize the inherent distinction between an ordinary law-suit and a constitutional law-suit. These plans are not nearly so radical as many people, after superficial examination, have supposed. They are simply efforts to hem in and limit the extraordinary power of judicial review. Marshall, Patterson, Samuel Chase and Bushrod Washington—to mention four early members of the United States Supreme Court—attempted to hem in this extraordinary power by starting a traditional and customary limitation. Their effort failed. The time has now come to do the same thing by the mandatory language of constitutional amendments.

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